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OCTOBER TERM, 1970

No. 936

DADE COUNTY SCHOOL BOARD, et al.,
Petitioner,

vs.

HERBERT PATE, et al.,
Plaintiff-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS ALICE LOVE ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	1
Questions Presented	3
Statement	4
Argument — Reasons for Denying Writ	14
I. The Court of Appeals Below Did Not Commit Reversible Error In Holding That The Dade County Public School System Had Not Been Converted From A Dual To A Single Unitary School System With Respect To Students	14
II. The Court of Appeals Below Did Not Improperly Apply Existing Law	19
III. The Civil Rights Act of 1964 Does Not Prevent Federal Courts From Ordering The Disestablishment Of Dual Public School Systems	23
Conclusion	24
Certificate of Service	25-26
Appendix	A 1

INDEX TO APPENDIX

	Page
(District Court's August 29, 1969) Order Approving Interim Desegregation Plan for Dade County Public Schools	A 1
(District Court's December 10, 1969) Order-Supplement to and Modification of Above	A 8
(District Court's January 8, 1970) Order on Motion for Leave for Clarification	A 14
(Respondents' Love et al. January 15, 1970) Motion to Amend Order	A 16
(Respondents' Love et al. January 20, 1970) Memorandum in Support of Motion to Amend Order and Accelerate Pupil Desegregation	A 17
(District Court's January 26, 1970) Order Approving Teacher Integration Plan and *Denying Motion by Intervenors for Immediate Pupil Desegration*	A 20
(Respondents' Love et al. January 26, 1970) Notice of Appeal to Court of Appeals	A 25
(Respondents' Love et al. July 15, 1970) Amendment to Notice of Appeal	A 26

TABLE OF AUTHORITIES

CASES

Page

Alexander v. Holmes,
1969, 396 U.S. 19 ..... 6, et seq.

Brown v. Board of Education,
1954, 347 U.S. 483, 1955, 349 U.S. 294 ..... 4, et seq.

Carter v. West Feliciana Parish School Board,
1970, 396 U.S. 290 ..... 8, 10, 18

Frank v. Braddock,
5th Cir. 1969, 420 F.2d 690 ..... 3, 7, 20

Gibson v. Board of Instruction of Dade County, Florida,
S.D. Fla. 1958, 170 F.Supp. 454, rev'd. 5th Cir. 1959, 272 F.2d 763; 5th Cir. 1957, 246 F.2d. 913 5

Green v. County School Board of New Kent County,
1968, 391 U.S. 430 ..... 5, 15, 21

Northcross v. Board of Education of the Memphis, Tennessee, City Schools,
1970, 397 U.S. 232 22

Singleton v. Jackson Municipal Separate School District,
5th Cir. 1969, 419 F.2d 1211 ..... 6, 7, 11

TABLE OF AUTHORITIES (cont.)

Page

United States v. District 151 of Cook County, Illinois,
7th Cir. 1968, 404 F.2d 1125 23

United States v. Jefferson County,
5th Cir. 1966, 372 F.2d 836 23

CONSTITUTIONAL PROVISIONS

Constitution of the United States,
Fourteenth Amendment ..... 3 et seq.

STATUTES AND RULES

Civil Rights Act of 1964, 42 U.S.C.,
sec. 2000 c and 2000 c (6) 4, 23

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OPINIONS BELOW

The significant opinions of the Courts below, taken chronologically, are as follows:

The August 29, 1969 "Order [of the District Court] Approving Interim Desegregation Plan for Dade County Public Schools" is reported at 303 F.Supp. 1069, is not included in the separate Appendix to the Petition, and appears in Respondents' Appendix attached hereto (Resp. App. p. A1).*

The December 10, 1969 "Order [of the District Court] —Supplement to and Modification" thereof is reported at 307 F.Supp. 1288, is not included in the Petitioners' Appendix, and appears in Respondents' Appendix (Resp. App. p. A 8).

The January 8, 1970 "Order [of the District Court] on Motion for Clarification" is not reported, is not included in the Petitioners' Appendix, and appears in Respondents' Appendix (Resp. App. p. A 14).

The January 26, 1970 "Order [of the District Court] Approving Teacher Integration Plan and Denying Motion by Intervenors for Immediate Pupil Desegregation" is not reported, appears in Petitioners' Appendix (Pet. App. pp. 124-128), and appears in Respondents' Appendix (Resp. App. p. A 20).

The June 5, 1970 Order and opinion of the Court of Appeals, remanding Respondents' appeal and Petitioners' cross-appeal (*inter alia*) from the January 26, 1970 order of the District Court, is not reported and appears in Petitioners' Appendix (Pet. App. pp. 76-77).

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*Respondents' Appendix, attached hereto, will be symbolized by "Resp. App.", the Petition by "Pet." and Petitioners' (separate) Appendix by "Pet. App." All emphasis in quoted material is added by counsel.

The June 26, 1970 "Memorandum Opinion [of the District Court] Approving Desegregation Plan for Dade County Public Schools with Modifications and Final Judgment" is not reported and appears in Petitioners' Appendix (Pet. App. pp. 20-51).

The July 24, 1970 "Supplemental Order [of the District Court] Approving Desegregation Plan for Dade County Public Schools, as Modified, and Amended Final Judgment" is not reported and appears in Petitioners' Appendix (Pet. App. pp. 51-75).

The August 12, 1970 Mandate and opinion of the Court of Appeals (to which the Petition filed herein is directed) is not reported and appears in Petitioners' Appendix (Pet. App. pp. 3-20).

QUESTIONS PRESENTED

The Petition sets forth three "Questions Presented" at p. 2,[1] the first of which contains a fallacious interpretation of the opinion below, the second of which contains an erroneous assumption of fact, and the third of which poses an irrelevant question of law.

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[1] "Questions Presented" as stated in Petition at p. 2:

"1. Whether, as a constitutional matter, any particular degree of racial balance must be achieved in the schools.

"2. Whether the Circuit Court of Appeals may, summarily and without benefit of the complete record, substitute its judgment for that of the District Court.

"3. Whether Congress has the power to define acts which comply with the 14th Amendment and whether such definitions are binding upon this Court."

Respondent therefore restates the "Questions Presented" in the Petition as follows:

1. Did the Court of Appeals below commit reversible error in holding that the Dade County Public School System had not been converted from a dual to a single unitary school system with respect to students?

   (Respondents answer "No")

2. Did the Court of Appeals below improperly apply existing law in the case at bar?

   (Respondents answer "No")

3. Does the Civil Rights Act of 1964 Prevent Federal Courts From Ordering the Disestablishment of Dual Public School Systems?

   (Respondents answer "No")

STATEMENT

Despite petitioners' constant and numerous protestations in this Court and in the courts below to the effect that "The Dade County School Board recognizes its affirmative responsibility to provide a desegregated, unitary and non-racial school board system . . . " (see e.g. Pet. p. 4, Pet. App. p. 80), the fact is that the School Board has failed to meet such responsibility in the fourteen years following *Brown v. Board of Education*, 1954, 347 U.S. 483 and continues to evade such responsibility *except in response to the threat of withdrawal of federal funds or in response to a direct unambiguous court order.*

In its August 29, 1969 opinion (Resp. App. p. A 1), the district court below noted that a Florida lawsuit to "effect the integration of the Dade County schools" was filed shortly after the *Brown* decisions[2] and that in 1960 Judge Lieb provided therein for a freedom of choice plan with jurisdiction retained while the plan was put into effect; nevertheless, at "the close of the 1968-1969 school year there were 42 all negro schools in the system out of a total of 217 schools" (Resp. App. pp. A 1-2).

Two days prior, on August 27, 1969 the district court had assumed jurisdiction of the within *Pate* case *inter alia* upon the School Board's petition for removal in order to avoid the "voiding of an interim plan providing for more integration" (the original plaintiffs sued in state court to block the closing of an all-Black High School under the School Board's "revised interim plan for the 1969-1970 school year," *a plan necessitated by the expressed judgment of the Department of Health, Education and Welfare that the Dade County school system was not in substantial compliance with Title VI of the 1965 Civil Rights Act and the consequent threat of the loss of federal funds*) (Resp. App. pp. A 2-4).[3]

The district court held the School Board's "interim plan" *unconstitutional* under *Green v. County School Board*

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[2]*Gibson v. Board of Instruction of Dade County, Florida*, S.D. Fla. 1958, 170 F.Supp. 454, rev'd 5th Cir. 1959, 272 F.2d 763 and see also 5th Cir. 1957, 246 F.2d 913, now consolidated with the within *Pate* case before the district court below (Resp. App. p. A 4).

[3]The district court consolidated with *Pate* the *Pardo* case removed to said court and the *Frank* case filed in district court, both involving attacks on the plan, and granted petitions to intervene by various individuals and organizations including Respondents herein (Resp. App. p. A 4). Subsequent grantings of petitions to intervene resulted in more than twenty parties in the district court of whom the overwhelming majority *opposed* desegregation.

of New Kent County, 1968, 391 U.S. 430, *inter alia* (Resp. App. p. A 5). The district court also held immediate pupil desegregation "not feasible" because it would result in "chaos" when "the 7th largest school system in the United States is due to open" eighty-four hours later (Resp. App. pp. A 5-6). The district court therefore "adopted and approved" the *unconstitutional* Board plan, ordered the School Board to submit (within 30 days, i.e., by September 28, 1969) an "administrative feasibility" study concerning "total disestablishment of a dual school system at the elementary and junior high levels at the beginning of the second semester of the 1969-1970 school year" (i.e., as of January, 1970) and to further submit to the court "by March 1, 1970 a plan to eliminate the dual school structure in grades 10-12 by no later than September 1, 1970" (Resp. App. pp. A 6-7).

Three and one half days after the district court's August 29, 1969 opinion discussed above, the Dade County 1969-1970 school year began . . . once again with an unconstitutional dual school system. During the school year, in respondents' opinion, the School Board diligently and assiduously attempted to forestall both faculty and student desegregation by delaying submission of the studies ordered, failing to evolve any meaningful plan, etc.

The School Board was not successful with respect to faculty desegregation. Pursuant to *this* Court's decision in *Alexander v. Holmes*, Oct. 29, 1969, 396 U.S. 19 and the Court of Appeals for the Fifth Circuit's decision in *Singleton v. Jackson Municipal Separate School District*, 5th Cir. Dec. 1, 1969, 419 F.2d 1211, the district court on December 10, 1969 ordered *complete faculty* desegregation by *February 1*, 1970. The court, however, did not order complete student desegregation until September 1, 1970 (Resp.

App. pp. A 8-9, see also further Order dated January 8, 1970, Resp. App. p. A 14).

Although the School Board had vigorously contested the possibility and/or practicality of total teacher desegregation by February 1, the School Board managed to achieve such result *once the date was firmly set by order of the district court.*

The district court in effect partially anticipated the December 12, 1969 decision of the court of appeals in *Frank v. Braddock*, 5th Cir. 1969, 420 F.2d 690, an appeal in a case *consolidated* with this case at bar, wherein the appellate court *reversed* the August 29, 1969 order of the district court on the ground that the *Alexander v. Holmes* and *Singleton v. Jackson* cases, *supra*, required that school district must "begin *immediately* to operate as *unitary* school systems" and "*unitary* operation [must occur] pending litigation" (420 F.2d at p. 691).[4]

The School Board's dilatory tactics were more successful with regard to pupil desegregation, at least until the August 1970 Order and Opinion of the court of appeals challenged herein finally required some degree of student desegregation in Dade County.[5]

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[4]Appellant Frank objected to desegration of a particular school under the School Board's "Interim Plan" approved by the district court's August 29, 1969 Order and in no way supported respondents' efforts for greater desegregation in less time. Nevertheless, the *Frank* appeal brought before the appellate the August 29, 1969 district court's Order.

[5]No doubt the School Board would have liked to postpone any final judgment until 84 hours before the opening of the present 1970-1971 school year so that another plea of "chaos" could have been made, thus yielding the possibility of another school year under a dual system declared unconstitutional by the district court below one year prior.

On January 15, 1970 respondents filed a "Motion to Amend Order" of the district court of December 10, 1969 and "to require the Dade County School Board to effectuate a *unitary* school system by February 1, 1970" (Resp. App. p. A 16). Respondents' "Memorandum In Support of Motion to Amend Order and Accelerate Pupil Desegregation" relied on this Court's opinion in *Carter v. West Feliciana Parish School Board*, January 14, 1970, 396 U.S. 290, to support their contention that "Dade's Board of Public Instruction cannot continue its pattern of perfunctory verbalization against racial discrimination while actually accepting or abetting it" (Resp. App. pp. A 17, 20).

On January 26, 1970 the district court entered its "Order Approving Teacher Integration Plan and *Denying Motion by Intervenors For Immediate Pupil Integration*" and stated as follows (Resp. App. p. A 20, at pp. A 22-23):

> "Also before the Court at this time is a motion by intervenors Alice Love, Carswell Washington and Martha Washington for *immediate pupil desegregation* in the Dade County School System. Joining as Amicus is the American Civil Liberties Union [of Florida] . . .
>
> "It is my decision that ordering total pupil desegregation by February 1, March 1, or any time prior to the opening of school in September of 1970 is *not physically possible* . . . [since] the only pupil desegregation plan which is available for implementation is that which is to be filed by the School Board on February 1 . . . [which] in addition to being geared to September 1, 1970 implementation, provides that 21 schools in Dade

> County will have all-black student bodies . . . [and] *I do not find that such plan would meet the constitutional standard of a unitary school system* . . . I find that disruption and chaos . . . should not be visited upon the Dade schools merely to implement an interim plan . . . "It is further ordered that the Dade County School Board shall submit a plan to this Court by April 1 which provides for the operation of a unitary school system by September, 1970 . . . "

In other words, the district court denied respondents' motion for immediate pupil desegregation *because the School Board had not submitted a constitutional plan for student desegregation as of January 26, 1970, wher more than half of the 1969-1970 school year had passed!*

On January 26, 1970 respondents appealed to the Court of Appeals for the Fifth Circuit from the district court's Order denying pupil desegregation prior to September 1, 1970 (Resp. App. p. A 25)[6] and the School Board cross-appealed "to that portion of the order holding that a district in which there would remain twenty-one all-black student bodies would not meet the constitutional requirements of a unitary school system" (Petitioner-School Board's Brief to the Court of Appeals dated February, 1970, p. 6).

Respondents' Brief to the Court of Appeals, dated February 23, 1970 took the position that under *this* Court's October 29, 1969 *Alexander v. Holmes* decision, *supra*,

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[6]On July 15, 1970 respondents filed an Amendment to Notice of Appeal adding the district court's June 26, 1970 Order and asserting that "the opinion and order appealed from is unconstitutional in that it fails to provide for a single unitary school system in Dade County, Florida" (Resp. App. p. A 26).

"the time for every school district to terminate dual school systems was *at once*," that the *Alexander* and *Carter v. West Feliciana* cases, *supra*, required that "both faculty *and pupils must be desegregated* on or before February 1, 1970" (p. 3) and stated as follows (at pp. 4 and 5):

> "To permit school boards to delay indefinitely the establishment of a unitary system because of their failure or unwillingness to adopt a Constitutional plan, is to reward them for their failure to take the affirmative action imposed upon them by law . . .
>
> (p. 4)

> "The Dade County School Board has, for the past 15 years, operated an unlawful and unconstitutional dual school system. In doing so they have, until recently, utilized the very means they now deplore to insure the success of its operation, that is, they have cross-bused white children past black schools. The board, as I see them, are before the Court with 'filthy hands' soliciting this Court's aid and approval to continue a course of unlawful conduct . . .
>
> (p. 5)

> " . . . the district court should have granted appellants' motion, and ordered the Dade County School Board to take whatever steps might be necessary, be it busing, boating or bobsledding, to convert to a unitary system in which racial discrimination would be eliminated root and branch, no black schools and no white schools, just schools and to do it now, February 1, 1970."
>
> (p. 7)

Respondents' Prayer for Relief in their Brief to the circuit court below including the following:

> "(1) A reversal of the district court's order with directions that pupils be integrated immediately.
>
> "(2) That said pupils be integrated, on more than a token basis, in a unitary system where no black schools or white schools remain.
>
> "(3) That the Dade County School Board be directed in unambiguous and no uncertain terms, to use whatever means, and take whatever steps necessary to accomplish and immediately convert to a unitary system."[7]
>
> (p. 8)

On June 5, 1970 the court of appeals entered its order remanding all appeals and cross-appeals in the case at bar (including those of respondents and petitioners herein) to the district court pending the lower court's approval of any new orders or plans based on additional

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[7]Respondents' Brief to the court of appeals was accompanied by a 35 page Appendix. Petitioner's Brief to said court, as appellees and cross-appellants, was 31 pages long. Said petitioner's Directions to the Clerk designated "All papers filed or *hereafter filed* in this cause including the transcripts of all hearings and exhibits . . ." The district court's Order and opinion of January 26, 1970 explicitly called "the attention of the parties" to the *Singleton* expedited appeal rules (Resp. App. p. A 27) A.C.L.U. of Florida attorneys assisted respondents' counsel in the praparation of the Brief to the circuit court of appeals, at respondents' request, said organization, as *amicus curiae*, having been the *only* party supporting respondents' Motion to accelerate pupil desegregation before the district court with more than 20 other parties opposing said Motion. A.C.L.U. of Florida attorneys now represent respondents as direct co-counsel in *this* Court, at respondents' request, along with Mr. Matthews who has represented respondents from the inception of their case.

hearings on May 22. The court of appeals ordered that "any new plans, together with any Findings and Conclusions of Law thereon, shall be filed with this court within 20 days from the date hereof" and *retained* jurisdiction of the appeals during "the *limited remand.*" (Pet. App. pp. 76-77).

The June 26, 1970 and July 24, 1970 Opinions of the district court "Approving Desegregation Plan for Dade County Public Schools . . ." with Final Judgment and Amended Final Judgment (Pet. App. pp. 20-51 and 51-75) were sent to the court of appeals, as required by the appellate court's June 5, 1970 "limited remand" order, and culminated in the August 12, 1970 Mandate of the court of appeals reversing the district court's decisions (in part) with respect to student desegregation (Pet. App. pp. 3-20). This decision and opinion of the court of appeals, which petitioners seek to have reviewed by this Court, held that the Dade County School system had been converted from a dual to a unitary school system by the district court's decision below with respect to faculty, staff, transportation, facilities, and extra-curricular activities . . . *but not with respect to student assignment.* The court of appeals stated as follows:

> ". . . the board's [March 31, 1970 final desegregation] plan leaves 36 schools all — or virtually all-Negro, housing 37,672 Negro students or 64% of the Negro student population. The modifications contained in both the district court's opinions [of June 26, and July 24, 1970] reduce these figures substantially, but still leave 22 schools all — or virtually all-Negro, housing 25,595 or 44% of the Negro student population . . . we find

that many of the reasons given for not achieving a greater degree of desegregation and the final results accomplished are unacceptable. . .

(Pet. App. p. 7)

"The following modifications reduce the number of Negro students attending all — or virtually all-Negro schools from 44% to 24% of the entire Negro student population. Implementation of these modifications effectively desegregate the Dade County School system. However, the district court is not precluded hereby from approving any plan which will achieve substantially the same results as achieved by our modifications or an even greater degree of desegregation. Such a plan must, of course, be approved by the district court and must be implemented as of the beginning of the 1970-1971 school year. If no such plan is submitted, the district court is directed to implement the following modifications . . .

(Pet. App. p. 9)

"It is not intended by this opinion that the district court be deprived of its discretion to adjust our modifications and any subsequently submitted by the board. Its discretion is limited, however, to the extent that no adjustments may diminish the degree of desegration required by this court. Of course, the school board and the district court are under a continuing duty to appraise the system in the light of actual conditions and experience and within the limits we have just indicated, make whatever changes are required to assure the maintenance of a unitary system."

(Pet. App. pp. 19-20)

On August 20, 1970 petitioners applied to the Honorable Justice Black of this Court requesting "that a stay of the Fifth Circuit's mandate be granted *for the current [1970-1971] school year, or* in the alternative, that a stay be granted *until final disposition of the petition for the writ of certiorari.*" Once again petitioners asserted that compliance with the disestablishment order of the court below was "*not possible.*"

When petitioners' application for a stay was denied, the School Board managed to effectuate the pupil desegregation plan set forth by the appellate court (with minor modifications by the district court in accordance with the court of appeals' opinion) during the present 1970-1971 school year.

Thus the Dade County public school system *finally* has some degree of student desegregation today, *fourteen years* after this Court's initial decision in *Brown v. Board of Education, supra.*[8]

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Did not Commit Reversible Error in Holding that the Dade County Public School System Had Not Been Converted From A Dual To A Single Unitary System With Respect To Students

[8]Respondents' time for filing this Brief in Opposition was extended to and including December 20, 1970 (see letter from the Clerk of this Court dated November 18, 1970).

Petitioners state Reason 1. as "Constitutional Obligation to Correct Imbalance . . . Whether, as a Constitutional Matter, Any Particular Degree of Racial Balance Must Be Achieved in Schools" (Pet. p. 11).

The simple fact of the matter is that neither the district court nor the court of appeals below held that any particular degree of racial balance must be achieved. Indeed, respondents herein (intervenors in the district court and intervenors-appellants-cross-appellees in the court of appeals) merely sought *disestablishment of Dade County's dual school system* without suggesting any specific plan or ratio or degree of racial balance. Opposed by approximately twenty attorneys and parties of record seeking *less* and/or *later* desegregation rather than more and sooner (including not only the Dade County School Board but also the Hon. Claude R. Kirk, Jr., Governor of Florida, the Hon. Earl Faircloth, Attorney General of Florida, and the Hon. William C. Cramer, U. S. House of Representatives), respondents counsel did not attempt to assume the duty to desegregate imposed by this Court on the School Board under *Green v. School Board of New Kent County*, 1968, 391 U.S. 430.

Only the American Civil Liberties Union of Florida, as *amicus curiae*, requested the district court (and did so formally by Memorandum of Law) to reject *all* plans before it and to seek or formulate a plan including cross-busing, if necessary, whereby *every* public school in Dade County would have a ratio of black and white students not deviating more than 10% either way from the ratio of 23% Black/77% White students throughout the system (i.e., no school would begin the 1970-1971 year with less than 13% Black students or more than 33% Black students, or less than 67% White students or more than 87% White students).

The district court explicitly rejected such position in its June 26, 1970 "Memorandum Opinion" (Pet. App. p. 23):

> "The American Civil Liberties Union proposes that the Court require a fixed ratio in every school in the County. The law does not require such drastic action to achieve a unitary system."

The court of appeals not only denied A.C.L.U.'s motion for leave to file a brief as amicus curiae (a motion accompanied by a copy of the brief desired to be filed, such brief containing the same position as taken in the district court) but also rejected A.C.L.U.'s position in no uncertain manner, i.e., the appellate court *retained* "all — or virtually all-Negro schools . . . [serving] 24% of the entire Negro student population" and even retained one *all-Black Senior High School* (Pet. App. pp. 9, 19).[9]

Petitioners' assertion that the court below imposed a "particular degree of racial balance" as a requirement for disestablishment of Dade County's dual school system is inexplicable to respondents.

About the only statement in Petitioners' argument on this "Reason" (Pet. pp. 11-18) with which respondents are in agreement is that "It is time that the *de facto-de jure* myth be laid to rest by this Court," a statement totally

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[9]Obviously A.C.L.U. of Florida, acting only as *amicus curiae* in the district court, (prior to its attorneys becoming direct co-counsel for respondents at respondents' request *after* the School Board's Petition for a writ of certiorari was filed in *this* Court), was in no position to appeal from the district court's orders and opinions to the court of appeals or to seek cross-certiorari to the court of appeals in *this* Court.

irrelevant in the case at bar as even petitioners concede that "in most southern states, including Florida, there have been laws requiring separate educational facilities for black and white, miscegenation laws and certain discriminatory public facilities laws . . ." (Pet. p. 14).[10]

Petitioners decry the appellate court's "fascination with the prospect of reducing the number of black students in all-black schools or virtually — all-black schools . . ." (Petition p. 8), deem the court of appeals improperly "engrossed with statistics" (Pet. p. 9), and fear that "the federal judiciary will engage in a gigantic numbers game, the result of which none can predict" (Pet. p. 18). But petitioners' *own* statistics reveal the incredible numbers game Dade County has been playing. *The March 31, 1970 Dade County School Board's Desegregation Plan* (Pet. App. pp. 80-87, see p. *82*) contemplated *250,000* public school students in September, 1970 (60,000 Black and 190,000 White) of whom *97,500* (24,000 Black and 73,500 White) would *not* be in "bi-racial or integrated situations," *with the School Board defining "bi-racial" or "integrated" schools as less than 95% Black and less than 95% White.* Under the School Board's "definition", about 70% of the schools would be "desegregated" as of September 1970 when:

> "There will remain 21 schools which will be all black, or more than 95% black. There will be approximately 51 schools which will be all white,

[10]Of course respondents' agreement is clearly based on a reason differing greatly from petitioners. In respondents' opinion, the historical facts concerning slavery, the badges of slavery and the effects of racial discrimination in our country have permeated the entire United States to the point where "de facto" segregation is an inherently inaccurate term or concept with respect to Black and White Americans.

> or in excess of 95% white; and there will be 147 regular schools which will be desegregated. In addition, there will be 8 special schools . . ."
> (Pet. App. p. 82)

It was obvious to respondents, it was obvious to the district court, and it was obvious to the court of appeals below that (1) *many more than half* of the Dade County public school students would be attending segregated schools as in the 1970-1971 school year if *any reasonable* definition of a segregated school be used; (2) the School Board's plan to "desegregate" "70%" of the schools was *no such plan* and was much too little, much too late under this Court's *Alexander v. Holmes* and *Carter v. West Feliciana* decisions[14]; and (3) Dade County would *not* be converted from a dual to a unitary school system for the present 1970-1971 school year *unless the courts assumed the responsibility* for upholding the Fourteenth Amendment and *this* Court's *Brown v. Board of Education* decisions and subsequent decisions relating thereto.

According to the Petition, Dade County is "a county which had commenced its efforts in desegregation as early as 1959, which had at the commencement of the 1968-1969 school year 134 integrated schools [under the School Board's unbelievable 95% definition of "integrated"?], *a community which has led the state and the south in its efforts to desegregate schools*" (Pet. p. 18).

If such statement be true, how sad it is; so much effort, so little accomplishment.

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[14] *Alexander v. Holmes County Board of Education*, 1969, 396 U.S. 19; *Carter v. West Feliciana Parish School Board*, 1970, 396 U.S. 290.

Respondents respectfully submit that since the Dade County School Board was unable or unwilling to disestablish the dual public school system for the 1970-1971 school year, the court of appeals below did not commit reversible error in recognizing such failure to convert to a unitary system and in correcting (to some extent at least) the unconstitutional situation existing at this late date.

II.

THE COURT OF APPEALS BELOW DID NOT IMPROPERLY APPLY EXISTING LAW

Petitioners' contention that the court of appeals has summarily "substituted its judgment" for that of the district court is without merit. Equally inaccurate is petitioners' assertion that respondents' appeal to the court of appeals and petitioners' cross-appeal were rendered "moot" in the case at bar.

Petitioners state that the "thrust of Love's appeal was that the pupil desegregation portion of the plan should be implemented immediately" (Petition p. 19). *The thrust of respondents' January* 1970 *appeal was that pupil desegregation should be ordered by the court and also be ordered immediately,* relief granted at least in part by the court of appeals' August 12, 1970 opinion below (Pet. App. p. 3). Respondents have never approved and do not today approve *any* of the alleged pupil desegregation plans offered by the School Board.

Respondents did duly prosecute their appeal to the circuit court,[12] (see "Statement," *supra*).

It should also be noted that petitioner-School Board filed a brief, appendix and transcript in the court of appeals as appellees and cross-appellants; moreover, such petitioners' February 3, 1970 "Directions to the Clerk" designated for transmission to the court of appeals "*All* papers filed *or hereafter filed in this cause, including the transcripts of all hearings and exhibits,* but excluding all notices of hearings, subpoenas, returns of service and summonses." Briefs were also filed in the court of appeals by amicus William C. Cramer, Intervenor-Dade County Classroom Teachers' Association, Inc. and Intervenor-Cross-Appellant-Governor Kirk (as well as by other parties in related appeals).[13]

The court of appeals gave *all due deference* not only to the district court below but also to petitioner-School Board by attempting to permit the school board and/or court below to formulate a constitutional disestablishment plan for the 1970-1971 school year (Pet. App. pp. 3-20). The School Board's *last* plan was blatantly insufficient (as revealed not only by testimony taken in the various hear-

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[12]See district court's order of January 26, 1970 (Resp. App. p. A 27) calling "the attention of the parties" to the court of appeals' *Singleton* language concerning expedition of school desegregation appeals, 419 F.2d at 1222; see also *Frank v. Braddock*, 5th Cir. 1969, 420 F.2d at 691 (fn. 1), relying on *this* Court's opinion in *Alexander v. Holmes, supra.*

[13]The court of appeals had more than sufficient information before it. Indeed, the district court's June 26 and July 24, 1970 Opinion and Orders (transmitted to the appellate court under *its* Order of limited remand on June 5, 1970) alone sufficed. In addition, the appellate court had before it appeals from other parties in the consolidated cases with *Pate*, see e.g., *Frank v. Braddock*, 5th Cir. 1969, 420 F.2d 690.

ings but also by the district court's June 26 and July 24, 1970 Memorandum Opinion and Supplemental Order, respectively, Pet. App. pp. 20-21 and 51-75). The district court's "great diligence" was duly noted but "the final results accomplished . . . [were] unacceptable." The court of appeals therefore reluctantly but dutifully and properly applied existing law to the facts in the case at bar. The court of appeal's August 12, 1970 opinion clearly demonstrates the due deference alluded to by respondents (see e.g. Pet. App. pp. 7 and 19-20).

The court of appeals, relying on this Court's decisions in *Brown v. Board of Education*, 1954, 347 U.S. 483, 1955, 349 U.S. 294, *Green v. County School Board of New Kent County*, 1968, 391 U.S. 430, and *Alexander v. Holmes County Board of Education*, 1969, 396 U.S. 19, *inter alia* (Pet. App. pp. 4, 8) found "many of the reasons given for not achieving a greater degree of desegregation and the final results accomplished . . . unacceptable" (Pet. App. 7). Having "studied the maps, the various plans, and thorough opinions" and having found the "purported obstacles to pairing, grouping or rezoning . . . including traffic hazards, school capacities, individual school programs, format and curricula, walking distances, natural barriers and grade levels in each school . . . [as well as] the recurring problem of the Spanish-speaking students in the school system"[14] *not* " ' of overriding importance . . .

[14]The "problem" of the Cuban American public school students appears to be the fact that they do not wish to speak Spanish as well and as often as their parents wish unless compelled to do so by the schools. Such students rapidly learn English in the community as well as in the schools (and particularly in *non*-bilingual schools) and then wish to communicate with non-Cuban Americans in English. See "A Process Description and Evaluation of the Programs for Bilingual Education Within Three Bilingual Elementary Schools in the Dade

(continued next page)

[with respect to] effective promotion of desegregation'" (Pet. App. pp. 7, 8), the court below had no choice but to apply existing law as it did.[15]

The School Board's desire for further delay until the 1971-1972 school year (or perhaps the 2071-2072 school year) and the School Board's desire to retain a dual school system as far as one of the six criteria is concerned (namely, pupil desegregation, see Pet. App. pp. 4-7 and Petition p. 13), intense as such desires may be, should not and did not prevent the appellate court below from securing to public school children a generation fourteen years removed from those who were plaintiffs in *Brown v. Board of Education, supra,* equal protection of the laws under the Fourteenth Amendment.

County Public Schools, Florida" by Von N. Beebe, May 15, 1970 (95 pp. independent study and conclusions commissioned by the Dade County Public School System and presently being reviewed and revised thereby, and see especially pp. 65, 71, 91, 25). *If* voluntary or compulsory "bilingual-bicultural" public schools are to be established in Dade County to teach the Spanish language and Cuban culture in equal degree as English and traditional American course curricula (see e.g. op. cit. pp. 6, 7, 54, 88), then Black public school students must have equal opportunity with White public school students to receive the benefits and/or disadvantages thereof. *If* so-called "bilingual-bicultural" public school education is Constitutional and advisable (a hypothesis neither accepted nor rejected by respondents at this time but one which presents serious Constitutional questions since it may require *segregation* of Cuban Americans and non-Cuban Americans, see op. cit. pp. 14-18, 28, 56, 77, 88-90), *then public school desegregation of Blacks and Whites must be incorporated therein or placed first* (contrary to current practice in Dade County, op. cit. pp. 14, 24, 36, 39, 43, 45, 54, 63-65, 67, 89).

[15]*Northcross v. Board of Education of the Memphis, Tennessee, City Schools,* 1970, 397 U. S. 232, petitioners' chief authority (Pet. p. 25) is not relevant because the appellate court in the case at bar determined that the district court's Order was insufficient *as a matter of law,* under the "evidence" set forth in the district court's opinion.

III.

THE CIVIL RIGHTS ACT OF 1964 DOES NOT PREVENT FEDERAL COURTS FROM ORDERING THE DISESTABLISHMENT OF DUAL PUBLIC SCHOOL SYSTEMS

The Civil Rights Act of 1964, 42 U.S.C. sec 2000c and Sec. 2000c(6), does *not* prevent federal courts from requiring disestablishment of dual public school systems under the Fourteenth Amendment.

Petitioners' position to the contrary is grounded on the erroneous conclusion that the Congressional statute limited or sought to limit the jurisdiction and equitable powers of the federal courts existing prior to, at the time of and subsequent to the passage of such statute. The statute "did not enlarge the court's existing powers to ensure compliance with constitutional standards . . . neither did it reduce [them]," *United States v. Jefferson County, Board of Education*, 5th Cir. 1966, 372 F.2d 836, 886.

It is clear that federal courts retain jurisdiction and power to order the elimination of public school segregation and the establishment of a unitary public school system by whatever means necessary, including cross-busing, so that equal protection of the laws under the Fourteenth Amendment may be reality rather than a dream. Cross-busing, when required or appropriate to "eliminate unconstitutional school segregation . . . is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination," *United States v. District 151 of Cook County, Illinois*, 7th Cir. 1968, 404 F.2d 1125 at p. 1130.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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